

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ERNEST ALLISON
Claimant

VS.

GOODLAND TIRE INC.
Respondent

AND

FEDERATED MUTUAL INSURANCE
Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 170,742

ORDER

Claimant requested review of the Award dated August 7, 1995, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument January 4, 1996.

APPEARANCES

Diane F. Barger of Emporia, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier. Gary R. Hathaway of Ulysses, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found that claimant failed to prove he sustained personal injury by accident arising out of and in the course of employment with respondent and, therefore, denied claimant's request for benefits. Claimant requested review of that finding. That is the only issue on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

Claimant alleges that he injured both knees and his back as a result of falling when attempting to get into a truck on or about April 13, 1990. At that time claimant was the president and part owner of the respondent company. Also, at the time of the alleged accident, the respondent company was in dire financial straits which led to its closure within one or two months of the alleged date of accident.

Claimant testified that he did not immediately seek medical treatment for his injuries although he did take a few days off from work. On May 16, 1990, claimant first sought medical treatment for his knees and advised the doctor at that visit that

he had fallen approximately one month before. Claimant returned to that doctor two months later in July 1990 with primarily right knee complaints. It appears those two doctor's visits comprised the entire medical treatment claimant received for the alleged bilateral knee injury. Claimant contends his knees have gradually, progressively worsened following the alleged April 1990 accident.

Claimant's history for prior knee injuries is significant. Claimant testified that he underwent right knee surgery in 1980 and left knee surgery for a torn medial meniscus in 1987. In 1988 a physician had recommended to claimant a total left knee replacement. Despite those prior problems, claimant testified his knees were asymptomatic immediately before April 1990.

Claimant also contends that he hurt his back as a result of the April 1990 fall and that his back began hurting that day. Claimant testified that he had not experienced back problems before the alleged accident except for minor back pains due to a life of hard work.

Claimant presented the testimony of James W. Connolly who worked for the respondent as a salesman at the time of the alleged accident. Mr. Connolly testified that he recalls one occasion when he helped claimant up from the ground after claimant had fallen next to a pickup. Because the company was doing better and thinking about expanding after claimant fell, Mr. Connolly believes the fall occurred in March or April 1989 although he is not certain. After that incident, Mr. Connolly recalls traveling with claimant and stopping at regular intervals for claimant to stretch his knees.

Claimant presented the testimony of orthopedic surgeon John J. Wertzberger, M.D. At claimant's counsel's request he saw claimant in May 1993 and believed claimant had a 28 percent whole body functional impairment according to the Revised Third Edition of the AMA Guides to the Evaluation of Permanent Impairment for the bilateral knee and low back conditions. Based upon the history claimant provided, the doctor also believed claimant's description of the injury was compatible with an aggravation of preexisting arthritis and degenerative disease in both knees.

Respondent presented the testimony of Ernest R. Schlachter, M.D., who the Administrative Law Judge selected to provide an independent medical examination. Dr. Schlachter examined claimant in September 1993 and diagnosed diabetes mellitus, diabetic neuropathy, and possible Charcot joint of the right knee and Charcot of the right foot, spinal arthritis, hypertension, and residual left-sided weakness from a previous stroke. He also diagnosed arthritis in both knees. Based

upon his evaluation, Dr. Schlachter did not believe that claimant sustained any permanent injury or impairment as a result of the April 1990 fall. Some of the facts that Dr. Schlachter considered in reaching that conclusion were the relatively minor complaints claimant had at the time of the accident and that when claimant finally sought medical attention he had no bruising or contusion which should have been present if claimant had a significant injury. Dr. Schlachter also testified that he understood a Texas physician had recommended a total left knee replacement in May 1988 and that someone who needed that surgery should be significantly restricted in their activities. Dr. Schlachter concluded that claimant's impairment is the result of prior injuries combined with the natural aging process and natural progression of diabetes mellitus rather than the alleged April 1990 accident.

Claimant took the deposition of Mary Sawchenko, a medical records custodian, in an attempt to enter Dr. Larry D. Sawchenko's medical report into evidence. Respondent's counsel objected to the omission of that medical report. Therefore, because Dr. Sawchenko did not testify that medical report cannot be considered pursuant to K.S.A. 44-519.

Based upon the entire record, the Appeals Board finds Dr. Schlachter's testimony the most persuasive and finds that it is more probably true than not true that claimant's ongoing symptomatology is the result of previous injuries and the natural aging and disease processes rather than the alleged accidental injury. Because he was appointed by the Administrative Law Judge to provide an independent medical evaluation, Dr. Schlachter was disinterested in the outcome of the litigation and unbiased in his opinions.

The Appeals Board adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 7, 1995, entered by Administrative Law Judge John D. Clark should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Emporia, KS
Frederick L. Haag, Wichita, KS
Gary R. Hathaway, Ulysses, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director